No. 15024.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE WESLEY STONE and HILDEGARD STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISABETH PATTEE FARNELL,

Appellees.

APPELLEES' BRIEF.

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Appellees.

APPELLEES' BRIEF.

I.

Statement of Pleadings and Facts Showing Jurisdiction.

Appellees (plaintiffs) are residents of the State of California. They filed their complaint against appellants (defendants) who are residents of the State of New York. The complaint was filed in the Superior Court of the State of California in and for the County of Los Angeles on the 14th day of January, 1955. The matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. Since the action is between citizens of different states and the sum in controversy exceeds $3,000.00, the United States District Court would have original jurisdiction of the action pursuant to 28 U. S. C. A. 1332(a)(1).

The proceedings were removed by appellants to the United States District Court for the Southern District of California, Central Division, pursuant to 28 U. S. C. A. 1441(a). The petition for removal alleged the diversity of citizenship of the parties. Thereafter appellants filed an answer and counterclaim as authorized by F. R. C. P. 81(c). The Bank of America was named as a defendant to the counterclaim, but was subsequently dismissed to avoid destroying diversity of citizenship and depriving the United States District Court of jurisdiction.

II.
Statement of the Case.

Appellants' statement of the case assumes facts most favorable to appellants and resolves conflicts in the evidence in appellants' favor. The decisions say that the opposite assumption and resolution of conflicts must be made in aid of the judgment of the trial court. As a consequence, important inaccuracies appear in appellants' statement of the case which is wholly inadequate to constitute an analysis of the evidence. The numerous and substantial conflicts in the evidence are not mentioned. However, the most important error is the assumption that the trial court believed Mr. and Mrs. Stone, which seems most unlikely in light of the judgment against them.

For convenience of discussion sometimes appellants will be referred to as the Stones or Mr. and Mrs. Stone, as the case may be, and sometimes appellees will be referred to as the Farnells or Mr. or Mrs. Farnell.

The fact that the Stones sold a parcel of improved residential real property to the Farnells for $38,000.00 and the further fact that approximately one-third of the main residence, the carport, the guest house, the cesspool and septic tank, and portions of the walks, driveways and landscaping and other appurtenances were not on the parcel of real property sold to the Farnells is admitted by all parties to this action. As the result of a survey made by the Farnells eight months after the purchase, the Farnells discovered the latter fact.

Appellants' statement of the case gives the impression that the Stones as well as the Farnells first learned the facts as a result of the survey. Whether or not the Stones knew this prior to the sale to the Farnells was one of the litigated issues, a fact which should be borne in mind.

Appellants' statement of the case infers that the testimony of Mrs. Stone about a purported conversation with Mrs. Farnell was necessarily accurate because it was not denied by Mrs. Farnell.[1] Mrs. Farnell was not called to the witness stand after Mrs. Stone had testified, but Mrs. Stone's cross-examination conflicted with her direct examination and with other testimony. So it is most reasonable for the trial court to believe either that there was no such conversation or that she was mistaken as to

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[1]The trial court is not required to accept as truth the testimony of a witness even if it were uncontradicted. (*Lombardi v. Tranchina* (1954), 129 Cal. App. 2d 778, 780, 277 P. 2d. 933; *United States v. Fotopulos* (C. C. A. 9, 1950), 180 F. 2d 631.)

the parties present and was speaking about the same conversation concerning which Mr. and Mrs. Farnell testified. In either event the judgment is consistent with the thought that the trial court did not believe Mrs. Stone's testimony.

The same may be said of Mrs. Stone's testimony about a map or sketch. It is quite apparent that this was the same map or sketch which Mr. Farnell referred to. However, Mrs. Stone said that it showed the location of the improvements on the property, while Mr. Farnell testified that it did not.

Appellees believe that there is adequate evidence of damage and much more than is mentioned by appellants. Ultimately every question of conflicting evidence becomes a question of whether or not there is evidence to sustain the trial court. All of the evidence was weighed in the trial court and credibility of witnesses was taken into account. It is the accepted appellate rule that the trial court's determination of these matters will not be disturbed on appeal and that a judgment will be sustained against an attack upon the sufficiency of the evidence if there is any substantial evidence to support the judgment.[2]

This being the law, it seems most direct and convenient to discuss the evidence and its conflicts in argument where they arise in opposition to the primary points of appellants' appeal, which points are based upon the contention that there is no evidential support for the judgment.

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[2]*Lassiter v. Guy F. Atkinson Co.* (1949, C. A. 9th), 176 F. 2d 984; *Calif. Bank v. Sayre* (1890), 85 Cal. 102; *Estate of Chamberlain* (1941), 44 Cal. App. 2d 193, 112 P. 2d 53; *Carvalho v. McCoy* (1954), 128 Cal. App. 2d 702, 276 P. 2d 21.

III.
Introduction to Argument.

Although the caption to appellants' first point indicates that it contains a discussion of the evidence, it is devoted to a discussion of the necessity for certain findings. The second point of appellants' argument discusses the evidence.

Appellants' list of questions involved and their specification of errors upon which appellants rely are almost all dependent upon assumed facts. The difference in viewpoint between appellants and appellees on this subject which has already appeared is a serious and perhaps a decisive issue on appeal.

Appellants sought to establish that all of the elements of actionable fraud must be found by the court and then that the evidence was insufficient to warrant such findings. A different approach has been adopted by the appellees in that the nature of actionable fraud is discussed and then it is pointed out that the record contains sufficient evidence to establish actionable fraud. That the findings and conclusions are sufficient to support the judgment, is separately treated. It is necessary to discuss the law of fraud and deceit briefly, but the sufficiency of the evidence is the meat of the coconut.

IV.

Argument.

1. A Positive Assertion, in a Manner Not Warranted by the Information of the Person Making It, of That Which Is Not True, Though He Believes It to Be True, Is Actual Fraud When Made to Induce Another to Enter Into a Contract.

The principles of fraud and deceit are well established both by statute in California and by court decision and neither the statutes on the subject nor the principles thereof, applied in California and generally elsewhere, are new. The attempted distinction between cases involving recision and those involving judgments for money damages for fraud and deceit is invalid. A close analysis of the decisions relied upon by appellants will disclose that simple mistake is ground for recision, but will not support an action for damages for fraud and deceit because, as expressed in some cases, there is no element of moral delinquency.[3]

The moral delinquency referred to is sometimes found in affirmative proof that certain representations were made by a defendant to a plaintiff and that the defendant at the time knew full well that what he said was false.[4] On the other hand, the nature of deceit is such that the deceitful defendant is more than likely to have taken considerable pains to conceal the fact that he had knowledge of the falsity of his statements and representations. Last of all could he be expected to admit it in court where all the chips are down!

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[3]*Woods-Faulkner & Co. v. Michelson* (C. C. A. 8th, 1933), 63 F. 2d 569.

[4]*Nathanson v. Murphy* (1955), 132 Cal. App. 2d 363, 282 P. 2d 174.

Where evidence of actual knowledge of the falsity of statements is found, it is usually in the form of inconsistencies, and demeanor and evidence of circumstances surrounding the facts in question which indicate to the experienced trial judge or to the jury that the defendant *must have known the truth* from which it may be properly inferred that he did know the truth.[5] On the other hand, when it appears that the defendant makes his representations with the assurance that they are the truth, when, as a matter of fact, he does not know whether they are true or not, but supposes so (perhaps because of some unreliable information he has picked up), there is present the element of moral delinquency referred to in the decisions.[6]

The case of false representations honestly made and based upon the type of information usually relied upon by reasonable men in their dealings is to be distinguished.[7] But where there is a duty to know the facts, which duty may be a legal duty or a duty arising out of the fact that the defendant has had every opportunity to know the true facts, the plaintiff has a legal right to rely upon the representations of the defendant even though the means of testing the truth of his statements is at hand.[8] A breach of the duty to know the truth and speak it is a fraud and a deceit which possesses the element of moral delinquency.[9]

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[5]*MacDonald v. deFremery* (1914), 168 Cal. 189, 142 Pac. 73.

[6]*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 134 P. 2d 764.

[7]*Bartlett v. Suburban Estates, Inc.* (1939), 12 Cal. 2d 527, 86 P. 2d 117.

[8]*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 134 P. 2d 764; *Teague v. Hall* (1916), 121 Cal. 668, 154 Pac. 851.

[9]*Gagne v. Bertran* (1954), 43 Cal. 2d 481, 275 P. 2d 15.

A more complete discussion from the standpoint of showing that cases cited by appellants are not opposed to the judgment in this case appears later in this brief. However, as background for discussion of evidence, the basic elements of fraud and deceit should be first supplied. And it should be pointed out that these basic elements are uniformly applied.

Undoubtedly not the first case on the subject, but interestingly enough far enough back to involve the practice of horse trading horses, which may be more familiar to some of the senior members of the court than to the writer, is the case of *Mayer v. Salazar,* which was decided July 8, 1890, 84 Cal. 646, 24 Pac. 597. The *Mayer* opinion clearly enunciates the principles both as established by our Civil Code and as even then long since generally recognized and established. The facts are that defendant's horse was unsound as a result of a spavin, which we understand might be likened to a cracked engine block in an automobile, but was represented to be sound. The plaintiff recognized some lameness in the horse, but the representations of the defendant were held actionable even though he swore in court that he didn't know that the horse was unsound. The opinion says in part (p. 649):

> "One of the code definitions of actual fraud committed by a party to a contract, with intent to induce another party to enter into the contract, is as follows:
>
> " 'The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.' (Civ. Code, sec. 1572, subd. 2.)
>
> "A case very similar to this was presented in *Litchfield v. Hutchinson,* 117 Mass. 195. There the plaintiff had purchased a horse from the defendant,

and at the trial he introduced evidence tending to show that he was induced to make the purchase by false representations made by the defendant as to the soundness of the horse. The defendant testified that he made no representations whatever, and that he had worked the horse almost every day for three or four weeks, and did not observe any lameness, or know that he was unsound. The appellate court, by Morton, J., said:

" 'This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was in fact unsound and lame, all of which the defendant well knew. To sustain such an action it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is fraud which renders him liable to the party who relies and acts upon the statement as true, *and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge. . . . If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge, and a representation by the defendant, made as of his own knowledge that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff,* if made with a view to induce him to purchase, and if relied on by him.'

"The law thus declared is evidently in harmony with the provisions of the code above cited, and we therefore advise that the judgment and order appealed from be affirmed." (Emphasis added.)

The same principles were applied to automobile trading in 1925 in the case of *Gaffney v. Graf* (1925), 73 Cal. App. 622, 625, 238 Pac. 1054, when the court said:

"On this appeal the appellants frankly concede that they told respondents that the car was a 1920 model and that in truth and in fact in was a 1919 model. They also concede the well-settled proposition that when parties are *in pari delicto* neither one should recover as against the other and that this rule is not modified or altered by reason of the fact that one party sustained more damage than the other. The sole ground of appeal urged by the appellants is that the facts do not justify the finding of the trial court that the allegations of fraud and false representations made in the complaint were true. They insist that it was incumbent upon the respondents to show that the appellants knew that the statements were false or that they made the statements with reckless disregard as to the truth or falsity of them and that they made them with intent to deceive. *The plain answer to the appellants is that they had every opportunity to know the truth of the matter contained in their representations as to the model of the car, and that they knew that the year of the car was an inducing feature to the sale.*

"When a party makes a positive statement of a fact which he does not know to be true, but which he intends to influence the purchaser to a sale, and these representations are relied upon by the purchaser and the sale is thereby effected, the party is answerable to the purchaser to the same extent as

if he had actually known that his representations were false. In other words, a person may not take it upon himself to state as a fact that of which he is wholly ignorant and escape legal responsibility such as would follow if he had known the falsity of the representations.

"Here it is conceded that the representations as to the model of the car were made by the appellants and that they were false. *The proof is without dispute that the appellants either knew them to be untrue or had every opportunity to know the true facts, and thus that they were recklessly made.* The essential elements are present in the proof—that the representations were made for the purpose of inducing the respondents to make the change, and that the respondents relied upon them and were induced to make the exchange thereby to their injury." (Emphasis added.)

In March of 1943 the law had not changed as is evidenced by the opinion of the California Supreme Court in *Shearer v. Cooper,* 21 Cal. 2d 695, 134 P. 2d 764. This time the fraud involved real property. Only a small portion of the opinion is quoted here although the entire opinion is well in point with the case at bar. At page 703 of the California Report, the court said:

"It is fair to assume that the defendant did not know the exact location of the boundaries of the acreage which he sold to the plaintiff; but under the law it is a matter about which he should have informed himself before making the representations. The trial court concluded that the defendant's positive assertions in a manner not warranted by the information he possessed, of that which was not true even though he believed it to be true, constituted

actual fraud within the meaning of subdivision 2 of section 1572 of the Civil Code."

Quoting further from page 704:

". . . In *Carpenter v. Hamilton,* the judgment for the plaintiffs was reversed because the plaintiffs chose to inspect the property before purchase and by such inspection ascertained the true factual situation, or, without any conflict in the evidence, the true condition was so apparent as to foreclose their claim of reliance. (See also to similar effect *Oppenheimer v. Clunie,* 142 Cal. 313 (75 P. 899); *Maxon-Nowlin Co. v. Norswing,* 166 Cal. 509 (137 Pac. 240); *Elko Mfg. Co. v. Brinkmeyer,* 216 Cal. 658 (15 P. 2d 751); *Gratz v. Schuler,* 25 Cal. App. 117 (142 P. 899); *Hackleman v. Lyman,* 50 Cal. App. 323 (195 P. 263).) That is not the situation disclosed by the record before us. Furthermore, it is not the law of this state that some examination made by the buyer will shield the seller from an action for damages. As was said in *Dow v. Swain,* 125 Cal. 674 (58 P. 271), 'Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts (and to that should be added, or if he represents them as known to him), and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations,' there is no reason why relief should not be granted, 'although an imperfect examination was made. It may have been imperfect because of the representations.' (See, also, *Neff v. Engler,* 205 Cal. 484 (271 P. 744).) As indicated in those cases the truth of the representations of the defendant in the present case could be checked accurately only by the employment of experts. In *Quarg v. Scher,* 136 Cal. 406 (69 P. 96), it was said that the purchaser had a right to rely

on the representations as to acreage; that the acreage of land cannot be seen by the eye at a glance, but can only be ascertained with accuracy by scientific measurements. (See, also, *Morey v. Bovee,* 218 Cal. 780 (25 P. 2d 2); *Eichelberger v. Mills Land & W. Co.,* 9 Cal. App. 628 (100 P. 117).) An instrument for measuring the area of a plane by passing a tracer around the boundary line is not the scientific instrument by which the area of land is accurately measured. Scientific measurement of land is commonly made on the ground by surveying instruments."

The last case from which we have quoted points out that "it is not the law of this state that some examination made by the buyer will shield the seller from an action of damages." If this is true it would be supposed that the buyer is not obliged to investigate the truth of the seller's representations, and this is indeed the law of this state. The opinion in *Teague v. Hall* (1916), 171 Cal. 668, 154 Pac. 851, contains a clear statement of the law at page 671 of the California Report:

> "This view of the law has been repeatedly declared in the decisions in this state. In *Ruhl v. Mott,* 120 Cal. 668, 676 [53 Pac. 307], the court says, 'it is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty in law is devolved upon him to employ such means of knowledge.' "

2. There Is Substantial Evidence in the Record That Appellants Had Actual Knowledge of the Untruth of the Statements Made by Them, That They Lacked an Honest Belief in Their Truth and That They Were Made in a Manner Not Warranted by Their Information.

Although the evidence may well be sufficient to establish more, the code definition of actual fraud referred to in the foregoing cases is a good measuring stick to have in hand while examining the evidence. Paragraph 2 of section 1572, California Civil Code, says that actual fraud is:

> "2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though be believes it to be true."

With reference to this section the California Supreme Court said that under the law the exact location of the boundaries of real property is a matter about which the vendor should inform himself before making representations. (*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 703, 134 P. 2d 764.)

Mr. Stone's testimony is so brief and direct concerning the information which he had about the boundaries of the property which he sold to the Farnells that we quote the pertinent part:

> "Q. Mr. Stone, coming directly to the time you purchased the property which you later sold to the Farnells, did you at the time have a survey made of that property? A. No, sir, I didn't.
>
> Q. Did you at any time ever know where the south boundary line of the property was? A. No, sir, I did not.
>
> Q. Did you at any time tell the Farnells or anyone else where the boundary line was? A. I can't

remember ever discussing any boundary lines with anyone at any time.

Q. When you purchased the property where did you asume that boundary line was, the south boundary line? A. When I purchased the property I assumed that the line was somewhere between the edge of the macadam and the edge of my driveway. I wasn't placing too much importance on it. I just didn't think about it, I guess.

Q. At any time did you learn anything negatively —at any time did you learn negatively anything with regard to the location of that south boundary line? A. Not until I received the letter from Mr. Farnell telling me that he had had this survey made." [R. 131-132.]

Appellants quote a portion of Mr. Stone's testimony and we repeat the pertinent part thereof:

"The Court: I mean as far as the property was concerned. Somebody sold it to you and you assumed that all the improvements were on the land?

The Witness: That is correct.

The Court: And that is the way you sold it?

The Witness: That is correct, your Honor.

The Court: And you also treated all the improvements as if they were on your land?

The Witness: I certainly did." [R. 133.]

Mr. Stone was in New York at the time that the negotiations were carried on with the Farnells. On cross-examination Mr. Stone testified:

"Q. Your wife was really carrying on the negotiations here, wasn't she? A. That is right.

Q. So you were really not conversant with the details of the negotiations? A. Correct." [R. 135.]

It is plain to see from Mr. Stone's testimony that he did not know the location of the boundaries of his property. In fact, he evidenced a careless disregard for them. He testified that he never knew where the south boundary line of his property was and never discussed "any boundary lines with anyone at any time." He didn't even discuss it with the party from whom he purchased the property! He just *assumed* that the south boundary was somewhere between the edge of the macadam and the edge of his driveway [R. 131] and he just *assumed* that all of the improvements were on the land. [R. 133.]

Mrs. Stone's testimony sharply conflicts with the statements of Mr. Stone and casts a shadow on his veracity; but aside from that for a moment, it appears that as far as Mr. Stone was concerned he didn't even have an established belief as to the location of the south boundary of his land. Under these circumstances, he most certainly lacked an honest belief in the truth of representations which he himself made to his real estate agent [see Ex. 1, the listing signed by Mr. Stone], as well as in the truth of the representations made by Mrs. Stone, his co-owner and agent, to the Farnells. How can it be contended otherwise?

But that they were carelessly and recklessly made in a manner not warranted by the information available to him must be beyond doubt. He not only had every opportunity to know the true facts, but as owner he owed a legal duty to know them, but he not only was never informed by anyone, he was apparently not even curious about them. The representations were, therefore, carelessly and recklessly made in a manner not warranted by the information available to him. (*Gaffney v. Graf* (1925), 73 Cal. App. 622, 238 Pac. 1054.) He had in fact no information concerning them.

We find no parallel between Mr. Stone's position and the case of *Williams v. Spazier* (1933), 134 Cal. App. 340, 25 P. 2d 851. In that case the defendant had purchased certain stock after his banker had given a favorable report about one Warren, the man who sold the stock, and the company issuing it. This stock was then resold to the plaintiff. The defendant had passed on the information received from Warren and this was false. The appellate court noted that from the evidence it might have been inferred that the defendant might have reasonably believed the statements to be true or that the opposite might have been inferred. The case turned upon the principle that in such circumstances it is the duty of the court to draw the inference in favor of fair dealing.

It is incredible that Mr. Stone, who purchased real property (which sold for $38.000.00) in an undeveloped area where there are no adjacent homes, buildings or fences [see Exs. 4 and 5 for photographs of the premises], would be so totally indifferent to the boundaries of his purchase as not to discuss the subject with anyone, including his vendor and his wife. Mrs. Stone's testimony adds to the incredibility because it is so different. She said that they had received a sketch from Mr. Daniels, the former owner, and when questioned on direct examination, referred to it as "the one he had given *us.*" (Emphasis added.) [R. 138.] And again on cross-examination when questioned, she said, "Well, I think he presented this to *us* as a survey." (Emphasis added.) [R. 141.] There were other similar references.

Mrs. Stone testified on direct examination that she had no information regarding the location of the south boundary line of the property up until the time the property was sold to the Farnells other than the sketch referred to.

[R. 138.] But on cross-examination she testified to a conversation with Mr. Daniels, the former owner, in which he advised her that the south boundary line cut off two feet of the southeast corner of the carport and that that two-foot portion of the carport was on Mulholland Drive, which was City property. [R. 139.] She said that she knew that at the time that she purchased the property. She testified that the map which she got from Mr. Daniels showed that a portion of the carport was over on City property and that that was the only discussion which she had with Mr. Daniels about the encroachment of the property on City property. [R. 140.]

She said that she thought that Mr. Daniels presented the sketch to them as a survey. When asked whether or not the map showed who it was surveyed for, she at first could not recall and then remembered "one map was given to us and it said down in the left-hand corner that it was prepared for my husband, but whether that was the map or not, I am not sure. But my husband had not had it prepared and it was something that he wouldn't pay for and that was after we had been in the house a week or so." [R. 141.] She said that Mr. Daniels had ordered the map and charged it to her husband but that they never paid the bill.

At the end of the trial, Mr. Stone was asked by Mr. Cutler, who was attorney for the Farnells:

> "Mr. Cutler: Do you know who prepared the sketch that Mr. Daniels ordered?
>
> Mr. Stone: All I can tell you is that a few days after I took possession of the house I received a bill from a strange firm and I refused to pay that bill. That is all I know.
>
> Mr. Cutler: You received the sketch, too, did you?

Mr. Stone: No, I didn't. I received a bill.

Mr. Cutler: Did you receive a sketch at all yourself?

Mr. Stone: Did I see?

Mr. Cutler: Yes.

Mr. Stone: I remember seeing such a sketch, I believe, yes. I seem to remember that." [R. 149-150.]

This is an interesting contrast with the positive testimony which Mr. Stone originally gave, all of which has previously been alluded to, but it makes no real difference in view of the fact that whatever the sketch might have been, it made little impression upon him.

From what has been said above about Mrs. Stone's testimony, it might be inferred that there was more than one map or sketch which Mrs. Stone had seen, but this seems unlikely in view of her prior testimony that she had no other information regarding the location of the south boundary line except from the sketch received from the former owner. [R. 138.] There is little doubt as to the fact that it was the sketch with Mr. Stone's name on it which Mrs. Stone said that she gave to Mrs. Farnell because Mr. Farnell, who was questioned earlier in the trial, refers to the same document stating that it was a plat made by some surveying outfit and it said on it, "Made for George Stone." [R. 122.]

It would appear from Mrs. Stone's testimony that if there was another map or sketch it did not have Mr. Stone's name on it. The sketch which Mrs. Stone showed to Mrs. Farnell and ultimately gave to her is undoubtedly the one with Mr. Stone's name on it because it is the one to which Mr. Farnell referred and there is no testimony or evidence or inference that more than one map

or sketch was ever given to or shown to the Farnells. In fact, counsel for appellants is apparently convinced of the same fact for he states the same conclusion at page 6 of appellants' brief.

What the sketch showed is in dispute. Mrs. Stone testified that it showed the improvements and an outline of the property. [R. 137, 139, 140.] Mr. Farnell testified that it only draws the outline of the property with no improvements shown on it. [R. 123.]

Mrs. Stone testified on direct examination that she didn't believe that Mr. Farnell was with her at the time that she and Mrs. Farnell had a conversation concerning the south boundary of the property, at which time she gave the sketch to Mrs. Farnell. [R. 137.] Counsel for appellants has assumed from this testimony that there were two conversations between Mrs. Stone and the Farnells, one in which both Mr. and Mrs. Farnell were present and the other in which only Mrs. Farnell was present.

There is every indication from the cross-examination of Mrs. Stone that both Mr. and Mrs. Farnell were present at the time of the conversation about which she testified because in cross-examination she was asked about what she told the Farnells, the plural being used in such a way as to indicate Mr. and Mrs. Farnell, and she again testified to the conversation she had referred to on direct examination, in each instance referring to both of them as if both of them were present. The testimony appears in the record at pages 142 and 143.

If it were to be asumed that there had been two conversations, it would seem apparent that the conversation with Mrs. Farnell alone would have been the first conversation because at that time Mrs. Stone gave Mrs. Farnell the map which apparently was in the hands of Mr. Farnell at the time that he talked to Mrs. Stone.

The testimony is not subject to an analysis which will produce a logical certainty as to whether there was one or two conversations between the Farnells and Mrs. Stone. Mrs. Stone only testified as to one and the Farnells only testified as to one. No one asked any of these parties whether or not there were others. On the other hand, Mrs. Stone was originally uncertain as to who was present. Her cross-examination indicated that both of the Farnells were present. This seems most likely.

It is very significant that the sketch or map referred to by both Mrs. Stone and Mr. Farnell seems to be the same one. The testimony as to what it showed is directly opposite. The court very apparently did not believe Mrs. Stone's testimony as to what the sketch showed or as to what she told the Farnells about the boundary, but believed the testimony of the Farnells as indicated by Finding III. [R. 50.]

To make an interim summary of the situation, the court from the conflicting evidence determined (1) that Mrs. Stone represented to the Farnells that all of the improvements were located on the land sold to the Farnells and (2) Mrs. Stone nevertheless knew, because she was told by Mr. Daniels, that a portion of the carport was on City property. (This is an admission against interest and not a conflict in the testimony.)

Two conclusions may be drawn: (1) That the representations made by Mrs. Stone were made in a manner not warranted by her information because she had no information which indicated that all of the improvements were on the land sold to the Farnells, and (2) that Mrs. Stone had actual knowledge of the untruth of the representations made in that she knew that a portion of the carport was on City property.

Having observed that Mrs. Stone admits a partial knowledge of the true facts, it is within the discretion of the court to believe that she knew the full true facts. But there is other evidence in the record which points to such a conclusion.

Appellants argue that it is inconceivable that the Stones would have taken a large second trust deed if they knew that a large part of the improvements was not on the property. On the other hand, Mr. Stone testified that in his opinion the property was worth only $25,000.00 at the time of the sale bearing in mind the fact that the improvements were not all located on the property. By making the sale, the Stones were relieved of an obligation represented by a note secured by a first trust deed in the sum of $15,083.64 and obtained $6,500.00 in cash and a 7% note secured by a trust deed on other property in the sum of $5,250.00. The sum of these amounts is $26,833.64, which they realized at the time of the sale without giving any consideration to the second trust deed of $11,166.36. In view of the fact that in Mr. Stone's opinion the property was only worth $25,000.00 [R. 133 and 134], he made a shrewd deal.

The testimony of appellants was that during the time they owned the property the main house was damaged by fire on February 8, 1953 [R. 132] and that appellants received $15,100.00 in insurance and expended in excess of $26,000.00 in repairing the house on the same foundation. Putting aside the thought that the court might not have believed these figures, having found reason to distrust the testimony of the parties in other respects, the disclosure of the fact that the house had been so burned and rebuilt at such cost made to the Farnells at the time of the purchase would tend to lull them into the belief

that the Stones had actual knowledge of the fact that the house was built upon their property.

The Stones may have thought that the only way that they could recoup their investment in the premises would be to rebuild the house and sell the entire property to some unsuspecting person.

It is interesting to note that in April of 1953 [R. 99] after the house was reconstructed, a gas line was run into the premises. Mr. Wilfong from the gas company went out to the premises to arrange for the installation of a meter and connecting the same to the main. He testified that the meter was to be installed ten feet northerly of the southeasterly corner of the main house. [R. 102.] Mr. Wilfong testified that the gas company was obligated to bring the gas pipe from the main on City property to the property line of the customer and that a footage alowance was made depending upon how many gas appliances were located upon the premises and that distances over the footage allowance thus computed would be charged to the owner. [R. 101.]

It was his duty to ascertain where the property line was and to measure the distance between the property line and the meter. He did this on the Stones' property and he thinks that he discussed the matter of the boundary as disclosed by his measurements, but he could not be positive [R. 103], but it appears that he did talk to Mr. or Mrs. Stone and then testified as follows:

> "Q. Do you recall what you told them in regard to the distance it would be from the main to their house? A. Yes. I have the distances right here." [R. 101.]

The distance was computed at 25 feet. His observations and calculations were reduced to writing and a

sketch was made showing the Stones' southern property line running at an angle across the carport and the papers were signed by Mr. or Mrs. Stone and a deposit was made. The service was then installed. [R. 102 and 103.]

By reference to Exhibit 3, the result of this information can be readily appreciated. The survey plat shows that the distance between the carport and the house is five feet and the length of the carport is 33 feet. When the distance between the meter and the corner of the house is added to the distance between the carport and the house, the sum is 15 feet, which means, according to Mr. Wilfong's calculations, that the property line ran across the carport leaving approximately 23 feet of the carport on City property.

When the installation was complete 42 feet of pipe was used, but the reason for the additional length of pipe is that the measurements were made on the top of the ground as the crow flies, while the pipe had to be installed underground in hilly terrain. Mr. Wilfong's survey, if it may be called that, was in error because it later developed that the entire carport and one-third of the main house are on City property. But this discrepancy is unimportant. What is important is the fact that in April, 1953, the Stones had before them information which was ample to disclose the urgent need for reliable information concerning their property lines.

Mr. Wilfong testified that it was his custom to discuss property lines with his customers and that he thinks that he did discuss it with the Stones, but that he couldn't be positive. [R. 103.] It would take an unusual and blasé man to refrain from disclosing the discovery that his customer's carport was built in the middle of the street. The likelihood that he did is strong.

To conclude this discussion, we refer to the code definition of actual fraud, California Civil Code, section 1572, and point out that (1) the Stones knew that the southerly boundary of the property was not located south of the carport as represented to the Farnells, and (2) the Stones positively asserted that the southerly boundary was located south of the carport in a manner not warranted by the information of Mrs. Stone or of Mr. Stone. We also refer to the California Civil Code definition of deceit (Sec. 1710) and point out that (1) the Stones suggested as a fact that all of the improvements were on the land sold and that they had no belief that this was true (Mr. Stone had no belief one way or another. Mrs. Stone knew from Mr. Daniel's statements that it was false); and that (2) the Stones had no reasonable ground to believe that their representations were true.

To use a different form of expression concerning the Stones' representations, borrowed verbatim from the decision in *Gaffney v. Graf* (1925), 73 Cal. App. 622, 625, 238 Pac. 1054:

> "The proof is without dispute that the appellants either knew them to be untrue or had every opportunity to know the true facts, and thus that they were recklessly made."

3. Under the Law the Evidence Establishes Fraud and Deceit—Not Mistake.

Point VI, pages 55 and 56 of appellants' brief, is devoted to the proposition that at best the evidence shows only that the Stones were mistaken.

A further discussion of the evidence at this point is unnecessary. It has been thoroughly discussed under the last heading. The law applicable to the evidence ad-

duced in this case is well established. A landowner is presumed to know his own boundaries and is responsible for the truth of representations which he makes concerning them.

Appellants heavily rely upon a supposed stipulation to the effect that there had been a mistake as to the boundaries. The record on this subject is quoted at page 55 of appellants' brief and is found in the record at page 59. This was not a stipulation that the Stones had simply been mistaken or that there had been a mutual mistake. It was not so intended, nor was it so accepted by the trial judge. The issues of fraud and deceit as heretofore outlined were all litigated after the supposed stipulation. Number III of THE QUESTIONS INVOLVED designated by appellants is dependent upon the supposed stipulation and, therefore, needs no further consideration. Number II of appellants' SPECIFICATION OF ERRORS UPON WHICH APPELLANTS RELY likewise needs no further consideration.

Mercer v. Lewis (1870), 39 Cal. 532, holds that allegations of actual fraud are not established by proof of mistake. *Cardozo v. Bank of America* (1953), 116 Cal. App. 2d 833, 254 P. 2d 949, holds that the defendant had committed constructive fraud upon the remaindermen named in her husband's Will by not giving them notice of the probate proceedings, even though a fraudulent intent was lacking. Neither of these cases has application to the case at bar for the reasons already stated and as more fully shown by the following authorities:

The case of *Nathanson v. Murphy* (1955), 132 Cal. App. 2d 363, 282 P. 2d 174, states the rule at page 369 of the California Report:

> "'As a general rule, the owner of real estate, in the absence of facts showing the contrary, is pre-

sumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts.' (*Eichelberger v. Mills Land etc. Co.,* 9 Cal. App. 628, 634 [100 P. 117].) (See also *Hargrove v. Henderson,* 108 Cal. App. 667, 674 [292 P. 148]; *Younis v. Hart,* 59 Cal. App. 2d 99, 104-105 [138 P. 2d 323].)"

Other cases to the same effect are:

Mills v. Hellinger (1950), 100 Cal. App. 2d 482, 224 P. 2d 34;

Salomons v. Lumsden (1949), 95 Cal. App. 2d Supp. 924, 213 P. 2d 132;

Younis v. Hart (1943), 59 Cal. App. 2d 99, 104-105, 138 P. 2d 323;

Hargrove v. Henderson (1930), 108 Cal. App. 667, 292 Pac. 148;

Dohrman v. J. B. Roof, Inc. (1930), 108 Cal. App. 456, 293 Pac. 173;

Lombardi v. Sinanides (1925), 71 Cal. App. 272, 279, 235 Pac. 455;

Harder v. Allred (1923), 61 Cal. App. 394, 214 Pac. 1017;

Del Grande v. Castelhun (1922), 56 Cal. App. 366, 205 Pac. 18;

DeBairos v. Barlin (1920), 46 Cal. App. 665, 190 Pac. 188;

Teague v. Hall (1916), 171 Cal. 668, 670, 154 Pac. 851;

Eichelberger v. Mills Land & Water Co. (1908), 9 Cal. App. 628, 100 Pac. 117.

The fact that the purchaser is entitled to rely upon the representations of the owner without independently investigating is covered in Point 5 of Argument to which reference is respectfully made.

Appellants can take no comfort from the qualification in the above quotation which reads, "in the absence of facts showing the contrary" because they are faced with a dilemma. Either they are presumed to know in which event false representations are actionable in fraud and deceit and the element of scienter is present; or they establish as a fact that they didn't know in which event they are equally chargeable with fraud and deceit for representing as a fact that which they knew that they did not know. In the latter situation scienter is likewise present.

A third situation exists which has already been discussed. When a person makes representations which he believes to be true and he has reasonable ground to so believe (which is to say if the information is such that a reasonable man would rely upon the information), scienter is not present. Total absence of information or a happy lack of concern for the subject does not excuse a defendant nor does reliance upon conversation when the truth can only be established by scientific methods (such as a survey) with the same degree of certainty as the representations conveyed.

4. Cases Cited by Appellants in Support of the Argument That the Stones Should Be Excused Because They Had Reasonable Grounds for Believing Their Representations Are Not in Point.

The gist of this matter was referred to in the last point. A word will suffice for the facts. The trial court weighed the conflict between Mrs. Stone's testimony and the testimony of Mr. and Mrs. Farnell and came to the conclusion that Mrs. Stone told the Farnells that the southerly boundary line ran south of the carport and the guest house and that all of the improvements were on the land. [Finding III, R. 51.] The trial court did not believe that she told them that two feet of the carport was on City property. Appellants' arguments appearing in their brief at pages 32 through 37 and Point III, pages 38 through 42 entirely depend for their efficacy upon the idea that Mrs. Stone's testimony concerning her representations to Mrs. Farnell must necessarily be accepted as true. The facts as established for the purposes of appeal eliminate the argument.

Nevertheless, the cases are easily distinguishable even against the assumption made by the appellants. The cases will be taken in the order in which they are cited commencing on page 32 of appellants' brief.

Meeker v. Cross (1922), 59 Cal. App. 512, 211 Pac. 229.

In this case the defendant was the president of a company. He was, in fact, a figurehead and had no close personal knowledge of the company's affairs. All of the information which he had came from subordinates, including expert accountants. The information which he possessed was from such sources as a reasonable man would generally rely upon and, in fact, it may be noted

in passing that the Corporations Code specifically provides that action taken by directors of a corporation based upon similar information will not expose them to personal liability for negligence. (Corps. Code, Sec. 829.) He was amply justified in believing the information which he received and passed on to plaintiff who relied thereon and purchased stock. However, the case actually turned upon the fact that the only representation actually established as having been made by the defendant was that the stock was worth $100.00 per share. The court said at page 519 of the California citation:

> "Moreover, the representation was a mere statement of value, namely: 'that the stock was worth $100 per share.' It stands naked and alone, and as such must be deemed merely the opinion of Cross as to the value of the property which he was offering for sale to one with whom no confidential relation existed but who was dealing with him at arm's-length."

And later on the same page, concluded the opinion as follows:

> "We are forced to the conclusion that the mere naked statement made by defendant to plaintiff that the stock was worth $100 per share cannot be accepted otherwise than as an opinion in the nature of trade talk, and as such plaintiff was not justified in relying thereon."

Bartlett v. Suburban Estates, Inc. (1939), 12 Cal. 2d 527, 86 P. 2d 117.

In this case defendants sold securities without a permit. A permit was actually required although it was established that none of the defendants nor their agents

or attorneys had knowledge that a permit was required. The sale of securities carries with it an implied representation that a permit has been secured. The court stated as quoted at page 33 of appellants' brief that where the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required, then he is not liable in fraud even though he was mistaken in his belief.

The information upon which defendants acted in this case was the advice of their attorneys at law and other professional advisors. Perhaps had the Stones made their representations based upon a survey which they had caused to be made which in fact was erroneous, they would have been excused from liability for fraud and deceit because they had acted upon information which a reasonable man would accept, but such was not the case.

Nunemacher v. Western Motor Transport Company (1927), 82 Cal. App. 233, 255 Pac. 266.

In accordance with the rule mentioned in the last case, the defendant in this case was not responsible for fraud and deceit since he had merely expressed his opinion that the business involved was a profitable business. Moreover, his opinion was based upon such information as is usually relied upon by reasonable men, to wit, a favorable report of the business including the fact that the volume of business was increasing. As the quotation in appellants' brief indicates, the court found that all of the representations made by the defendant were fully justified by the facts and circumstances as they existed and were known to defendant at the time that they were made and the appellate court observed that this finding was fully supported by the evidence. The case was further decided

upon the fact that no damage was shown to have been suffered by the plaintiff.

Brown v. Harper (1953), 116 Cal. App. 2d 48, 53, 253 P. 2d 95.

This case involves a suit by a wife against her former husband for fraud in representing that he did not own an interest in a partnership. The court found that the representations were false although unknowingly and innocently made by defendant and in addition the plaintiff did not rely upon this representation to her. Reliance upon the representation is, of course, an element of actionable fraud. The court pointed out that the elements of intent and knowledge and reliance were all absent.

Cox v. Westling (1950), 96 Cal. App. 2d 225, 229, 215 P. 2d 52.

This case turned upon the simple fact that the representation made by the defendant was simply sales talk and that the plaintiff so understood it, which is to say that it was not a material misrepresentation and that the plaintiff did not rely upon it to his damage.

McElligott v. Freeland (1934), 139 Cal. App. 143, 154, 33 P. 2d 430.

Appellants quote from this case at page 35 of their brief. The frailty of the quotation is that it simply states the contention of the appellants and a statement in general terms of what is contained in California Civil Code, Section 1572, Subsection 1, which would be the only section applicable to the case from which the quotation was taken.

The defendant maintained that he was only a stock salesman and had no knowledge of the internal affairs of the corporation whose stock was sold to the plaintiff

and that he based his information on financial statements prepared and put out by the officers of the company. The court conceded that this was the type of information which a reasonable man would rely upon, but pointed out that he made a further representation that the money derived from the sale of the stock to plaintiff would go into the treasury of the corporation and would be used for the expansion of the business. The court then said at page 155 of the California citation:

> "Obviously appellant Freeland knew that the money which Powers paid him for the 2,020 shares of stock would not go into the treasury of the Hollywood Dry Corporation. Furthermore, it is to be remembered that Freeland admitted that, during the whole of the period when he was endeavoring to sell stock to Powers, he occupied an office rent free in the building of the Hollywood Dry Corporation in Los Angeles. This was a circumstance which the trial court was entitled to consider and which may well have moved the court to disbelieve his statement that he did not know that his representations respecting the success of the company and of the profits it had made and the value of its stock were false statements."

The words just quoted are indicative of the sometimes small circumstances which will cause a court to disbelieve testimony of a party and exemplifies the fact that the court was well warranted in disbelieving the testimony of Mrs. Stone in this case.

In the sale of stock those who are possessed of information concerning the company and who make representations regarding the same are held to as high a degree of accountability as are the owners of land who are in a similar position. The falsity of their representations

may not be excused simply because they contend that they have not taken the pains to discover the truth. On the other hand, those who sell stock and who base their representations concerning the same and the company upon information published by the company and on other usual sources of information, act upon the type of information which a reasonable man ordinarily accepts.

Walker v. Dept. of Public Works (1930), 108 Cal. App. 508, 291 Pac. 907.

Agents of the Department of Public Works made certain declarations concerning the quality and productivity of land. The appellate court pointed out that all representations of fact concerning the property which were made by defendants' agents were in accordance with the facts as they existed at the time that they were made. The agents made additional representations as to the amount of agricultural products which the land would produce. The court held that such statements could not become the basis of a charge of fraud and deceit because they are highly speculative in character and represent only an opinion.

Daley v. Quick (1893), 99 Cal. 179, 33 Pac. 859.

Plaintiff rented a woodshed from defendant. A year and a half later it collapsed and plaintiff was injured. He contended that defendant fraudulently represented that the woodshed was safe in order to induce him to rent the property. The court stated that there were no reasonable grounds for supposing that the premises were not safe when rented and that, therefore, there was no actionable fraud or deceit. The case is in no wise parallel to the case at bar.

Nathanson v. Murphy (1955), 132 Cal. App. 2d 363, 367, 282 P. 2d 174.

This case has already been cited in this brief and is one of the latest cases in support of the position of appellees, the Farnells. It does not stand for the point for which it is cited at page 36 of appellants' brief. Damages were awarded for fraud and deceit in connection with the sale of real property, it being established that the representations of the defendant were false and defendant knew it at the time that they were made.

Appellants again cite *Wishnick v. Frye* (1952), 111 Cal. App. 2d 926, 245 P. 2d 532, both at pages 37 and 39, upon which they heavily rely. It is an action for fraud and deceit which was reversed for a failure to find on the question of scienter. As already mentioned, scienter does not always mean a carefully premeditated evil design to fleece an innocent party. It may sometimes be presumed from circumstances and may likewise be inferred. No useful purpose is served by attempting an academic comparison of cases involving recision in contrast to those involving damages for fraud and deceit because the facts of this case coincide completely with the decided cases cited in this brief involving damages for fraud and deceit in the sale of real property.

5. The Evidence Fully Establishes That the Farnells Relied Upon the False Representations of the Stones.

There is no contention on the part of appellants that the false representations which were made to the Farnells were not material or that the Farnells did not rely upon these representations. The only contention made is that from the conversation which Mrs. Stone said that she had with Mrs. Farnell in which she stated that she told

Mrs. Farnell that two feet of the carport were on City property put the Farnells on such notice that they had a duty to inquire as to the boundaries of the land before they purchased and that the failure to make inquiry sufficient to determine where the boundaries were was a negligent omission. Citing *Gonsalves v. Hodgson* (1951), 38 Cal. 2d 91, 237 P. 2d 656; *Carpenter v. Hamilton* (1936), 18 Cal. App. 2d 69, 62 P. 2d 1397; and *Hobart v. Hobart Estate Co.* (1945), 26 Cal. 2d 412, 159 P. 2d 958, as well as excerpts from California Jurisprudence.

This argument is again based upon the assumption that Mrs. Stone's testimony must be accepted as true, which has already been thoroughly discussed. The court's determination of the facts is the same as if Mrs. Stone had never claimed to have made such statements. Nevertheless, as in each other instance where this claim is the foundation of a point in the brief, the issue is easily met.

The section from which a quotation from California Jurisprudence is taken is entitled, "Effect of suspicious circumstances", and following in the same section appears the following at 23 Cal. Jur. 2d 96:

> "The circumstances, however, must be such that inquiry becomes a duty and failure to make it a negligent omission. Thus, the misrepresentation may itself be of such a nature as to lull the other party into a sense of security or state of inaction."

And later:

> "Moreover, a party's suspicions must have been reasonably allayed by the other party's positive reassurances or representations."

And Section 40 at 23 Cal. Jur. 2d 98, points out:

> "One to whom a fraudulent misrepresentation has been made is not held to constructive notice of a public record which would reveal the true facts. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value."

Gonsalves v. Hodgson, supra, involves a ship building contract. The court declined to pass upon the question of whether or not a fraudulent representation was made in view of the fact that the record failed to show any damage resulting from any such alleged fraudulent representations since the value of the vessel other than its cost was not shown.

In *Carpenter v. Hamilton, supra,* which was quoted by appellants, the court said at page 71 of the California Report:

> "Plaintiffs had a right to rely upon the representations made to them concerning matters of fact which were unknown to them, without making any inquiry concerning the truth thereof, and had they done so defendant could not evade the consequences of any false and fraudulent statements he may have made by showing that means of knowledge of the truth were easily available to plaintiffs. (*Bank of Woodland v. Hiatt,* 58 Cal. 234; *Dow v. Swain,* 125 Cal. 674 [58 Pac. 271]; *Spreckels v. Gorrill,* 152 Cal. 383 [92 Pac. 1011]; *MacDonald v. deFremery,* 168 Cal. 189 [142 Pac. 73].)
>
> "But the right to rely upon the representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and, in mak-

ing such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts. (*Ruhl v. Mott,* 120 Cal. 668 [53 Pac. 304]; *Gratz v. Schuler,* 25 Cal. App. 117 [142 Pac. 899]; *Oppenheimer v. Clunie,* 142 Cal. 313 [75 Pac. 899].)

"Upon the question of knowledge it is held, generally, that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned."

The difference between *Carpenter v. Hamilton* and the case at bar is obvious from the foregoing quotation in that the Farnells did not make their own investigation but relied upon the false and fraudulent statements made by the Stones and as the court says, the fact that the Farnells may have had the means of knowledge of the truth easily available to them does not permit the Stones to escape liability. This is the universally applied rule of this state as the following cases indicate:

The latest case on the subject is *Nathanson v. Murphy* (1955), 132 Cal. App. 2d 363, 282 P. 2d 174, the court saying at page 369 of the California Report:

"5. Plaintiff reasonably believed the representations to be true. Defendants, after stating 'we admit the majority of California cases seem to be the contrary' refer to the rule cited in 12 Ruling Case Law 372 (citing *Champion v. Woods,* 79 Cal. 17, 21 P.

534, 12 Am. St. Rep. 126) to the effect that where the means of knowledge are at hand and equally available to both parties and the subject matter is alike open to their inspection, one who fails to avail himself of these opportunities will not be heard to say that he was deceived by the others' misrepresentations. The rule has never been applied in California to representations as to land quantities."

The citation taken by appellants from *Hobart v. Hobart Estate Co., supra,* involves a question of the running of the statute of limitations, the question being when a person has been put on notice of a fraud having been committed against him, the court pointing out that the time begins to run upon the discovery of suspicious circumstances. The fact that the quotation concerns the running of the statute of limitations and not the question of reliance upon fraudulent representations does not appear because the portion of the quotation which would disclose that fact was omitted.

In the case of *Younis v. Hart* (1943), 59 Cal. App. 2d 99, 138 P. 2d 323, the court held, quoting from 59 Cal. App. 2d 99, 103:

> "Moreover, his statement that the easterly line of the lot was seven feet east of the easterly concrete wall of the ex-dance hall while in fact it was flush with the east wall thereof was itself a material misrepresentation and it was sufficient to justify a recission."

And later at page 104 stated the California rule to be:

> ". . . So long as plaintiffs placed their faith in the statement of defendant, their walking upon

the premises with him does not diminish the significance of his statement as a misrepresentation of the area of the lot. It was defendant's land and it was therefore his duty to know its boundaries before attempting to sell it. Plaintiffs' casual inspection did not relieve defendant of his obligation to speak with accuracy. In the purchase of land the buyer has the absolute right to rely upon the express statement of the seller concerning an existing fact the truth of which is known to the vendor and unknown to the vendee. (*Shearer v. Cooper*, 21 Cal. 2d 695, 704, 134 Pac. 2d 764; *Neff v. Engler*, 205 Cal. 484, 271 P. 744; *Dow v. Swain*, 125 Cal. 674, 58 P. 271.) In order for these plaintiffs to have learned independently the exact frontage of the lot it would have been necessary for them to make use of scientific devices. They made no pretense at a measurement. Having relied upon the word of defendant, their walking upon the premises before the purchase did not impair their right gained by such reliance. (*French v. Freeman*, 191 Cal. 579, 587, 217 Pac. 515.) The mere fact that the opportunity and means for ascertaining the exact frontage were available to plaintiffs does not defeat their right of recovery. (*Brown v. Oxtoby*, 45 Cal. App. 2d 702, 706, 114 P. 2d 622.)"

See also *Shearer v. Cooper* (1943), 21 Cal. 2d 695, 134 P. 2d 764, a quotation from which appears at Point 1 of the argument of this brief.

6. There Is an Adequate Finding of Damages Which Fully Supports the Conclusion of Law and Judgment That the Farnells Are Entitled to $15,000.00 Damages. This Finding Is Supported by the Evidence.

The trial court made the following finding on damages:

"VIII.

"It is true that as a direct and proximate result of defendants' misrepresentation as aforesaid, plaintiffs were damaged in the sum of $15,000.00."

Applying the out-of-pocket rule mentioned by appellants as the appropriate measure of damage in this case, the only problem for decision by the trial court was a question of value of property. The out-of-pocket rule of damages is simply that the plaintiff is entitled to the difference between the purchase price and the value of what he received. The purchase price is without dispute the sum of $38,000.00. As soon as the value of what has been received has been determined, the rest is simple arithmetic.

A qualified appraiser testified that in his opinion the property which the Farnells received was worth $10,600.00. [R. 79.] Mr. George Stone, the former owner, testified that in his opinion the property which the Farnells received was worth $25,000.00. [R. 134.] Applying the testimony of the appraiser, Mr. Baehr, the amount of damages would be $27,400.00. Applying the testimony of Mr. George Stone, the amount of damages would be $13,000.00, but it was up to the court to fix the damages and the court has the authority to determine the value, whether it coincides with the testimony of the witnesses or not.

The law does not require more than is required by the laws of mathematics in the solution of a simple problem in subtraction which has already been referred to. There are three parts to the problem, the minuend, the substrahend and the difference. If the minuend and the subtrahend are known, the difference can be computed. By the same token, if the minuend and the difference are known, the subtrahend is easily supplied. The law is not more exacting than the mathematical problem itself. When the minuend is known and the findings supply the difference, they are adequate.

We quote from *Employees' Participating Assn. v. Pine* (1949), 91 Cal. App. 2d 299, 302-303, 204 P. 2d 965:

> "There was evidence, oral and documentary, showing the selling price of the property to be $21,750, and there was expert testimony that the value of the property at the time of the breach was not 'over $17,000.' That evidence would have been legally sufficient to have supported a finding that the plaintiff was damaged in the sum of $4,750 (the difference between the selling price and the market value at the time of the breach). As shown above, the court awarded damages in the sum of $2,500, which was less than the amount of said difference in values. The trial court was not required to find the value of the property to be the full value stated by a witness. It was stated in the case of *Roloff v. Hundeby*, 105 Cal. App. 645, at pages 652-653 [288 Pac. 702]: 'Questions of value are almost always matters of opinion, and evidence thereon usually goes no further than to give the court more or less general ideas on the subject. From the evidence thus received a trial court must draw its own conclusions of value by a process of balancing and reconciling, if possible, the varying opinions. . . . [T]he trial court,

in an effort to attain an even justice, often exercises a wide discretion in awarding damages.' Apparently the court herein found the market value of the property to be $19,250 at the time of the breach (which is $2,500 less than the selling price of $21,750).

"A trial court need not set forth computations showing by what method it determined the amount of damages to be awarded. (*Roloff v. Hundeby, supra,* p. 652.) The case of *Klegman v. Moyer,* 91 Cal. App. 333 [266 Pac. 1009], was an action to recover damages for an alleged breach of contract to exchange real property. The trial court awarded plaintiff damages in the sum of $5,000 but did not set forth its process of computation. On appeal the court stated therein, at page 346: 'We are entitled to draw necessary inferences from the findings in order to support a judgment. . . . "It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it." ' The trial court herein had before it testimony as to the value of the property at the time of the breach, testimony regarding fluctuation in market values at the time of and immediately after the breach, evidence of the type, construction and age of the building, and conditions generally in that neighborhood. The finding as to the amount of damages is supported by the evidence.

"The judgment is affirmed."

See also *Ginsburg v. Royal Inv. Co.* (1950), 179 F. 2d 152, to the same effect.

The case of *Bagdasarian v. Gragnon* (1948), 31 Cal. 2d 744, 192 P. 2d 935, referred to by appellants is not

opposed to the foregoing principles. In the *Bagdasarian* case it was obvious to the court that an element affecting the amount of the award of damages had been omitted from the court's consideration. The evidence on the subject was conflicting; so the appellate court returned the case to the trial court for determination of this single issue, and otherwise affirmed the judgment.

In the case at bar there is nothing to discredit the court's determination of the issue of damages. The portion of Finding IV [R. 53] (erroneously referred to at page 43 of appellants' brief as VI) which is attacked as a negative pregnant is not an attempt to establish the subtrahend of the subtraction problem; so this issue is a straw man.

It is a straw man for the reason just stated and for several other reasons. It is not necessary to turn to analogy to find the California law on negative pregnants appearing in findings. The cases cited by appellants, commencing at the bottom of page 43 through 46,[10] concern negative pregnants appearing in answers and are therefore not in point. The California law concerning the matter of negative pregnants in findings is well expressed

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[10] *Janeway & Carpender v. Long Beach Paper & Paint Co.* (1922), 190 Cal. 150, 21 Pac. 6;

Beetson v. Hollywood Athletic Club (1930), 109 Cal. App. 715, 293 Pac. 821;

Armer v. Dorton (1942), 50 Cal. App. 2d 413, 123 P. 2d 94;

Preston v. Central Cal. etc. Irr. Dist. (1909), 11 Cal. App. 190, 104 Pac. 462;

Schroeder v. Mauzy (1911), 16 Cal. App. 443, 118 Pac. 459;

Kennedy v. Rosecrans Gardens, Inc. (1952), 114 Cal. App. 2d 87, 249 P. 2d 593.

in the late case of *Heifetz v. Bell* (1950), 101 Cal. App. 2d 275, 225 P. 2d 231, at page 277 of the California Report:

> "It is fervently contended that because the finding of nonreliance, and other findings contain negative pregnants they imply the truth of allegations they purport to controvert. While such findings are not to be approved as to their form a reversal on that account will not be ordered. The doctrine still obtains that findings are to be accorded a liberal construction with a view of supporting rather than defeating a judgment, and where it is plain that the intent was to find the material facts against appellant, the trial court's decision will not be set aside. (*Johndrow v. Thomas,* 31 Cal. 2d 202, 208 [187 P. 2d 681]; *McAuliffe v. McAuliffe,* 53 Cal. App. 352, 355 [199 Pac. 1071]; *Ballagh v. Williams,* 50 Cal. App. 2d 10, 14 [122 P. 2d 343].) It is clear from the findings as a whole and a review of the entire record that it was intended to find adversely on each of appellants' allegations relative to any material fraudulent representations. If there be error present, it is not such as to have prejudiced appellants, or resulted in a miscarriage of justice. Section 4½, article VI of the Constitution was enacted for the purpose of preventing reversals in just such situations as are presented here. Where the record indicates that a fair trial was had and the decision reasonably indicates the true findings and conclusions of the court and that the issues have been clearly cast and fairly determined, the judgment will not be upset.
>
> "Judgment affirmed."

The following cases are to the same effect.

Johndrow v. Thomas (1947), 21 Cal. 2d 202, 209, 187 P. 2d 681:

". . . It has been settled by a legion of cases that 'Findings should be accorded a liberal construction, with a view of supporting, rather than defeating, the judgment'."

Ballagh v. Williams (1942), 50 Cal. App. 2d 10, 122 P. 2d 343;

Arnheim v. Firemen's Ins. Co. (1924), 67 Cal. App. 468, 227 Pac. 676;

McAuliffe v. McAuliffe (1921), 53 Cal. App. 352, 199 Pac. 1071.

Appellants' argument is a straw man for yet another reason. The procedure for the trial of cases in United States District Courts is governed by the Federal Rules of Civil Procedure. The necessity for findings and their scope is a procedural matter governed by Rule 52(a). The rules applied to civil actions in the courts of California dove-tail with the rules applied in civil actions in the courts of the United States.

The Federal viewpoint is well expressed in the 1952 Ninth Circuit case of *Carr v. Yokohama Specie Bank, Limited, of San Francisco*, 200 F. 2d 251.

The extent to which the procedural rules of California and of the United States coincide is exemplified by the fact that California courts are controlled by Article VI, Section 4½, of the State's Constitution, which reads in part:

"No judgment shall be set aside, . . . in any case, . . . for any error as to any matter of pleading, or for any matter of procedure, unless,

> after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The courts of the United States are controlled by F. R. C. P. 61 and by 28 U. S. C. A. 2111, which reads as follows:

> "Sec 2111. Harmless Error.
>
> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The results reached by appellate courts of both systems are correspondingly similar.

Before leaving this point for the next, attention should be given to appellants' attempt to apply the principles of the *Bagdasarian* case to the one at bar. Their point is based upon the erroneous contention that the guest house furniture in the Stone-Farnell transaction was not taken into account by the court in awarding damages, and that in this respect the case is on all fours with the *Bagdasarian* case.

There are important differences. It was established in the *Bagdasarian* case that the farm equipment was not taken into account. The same is not true of the case at bar. The second important difference, from the standpoint of discussion, is interwoven with the first, to wit: Appellants erroneously assume that the value of the furniture does not appear in the record. However, the value was established by Mr. Baehr as being $2,500.00 [R. 79.]

Appellants' argument assumes that the record discloses that the testimony of value of the property which the Farnells actually received was without regard for the guest house furniture. The very contrary is true. The fact that the appraiser, Mr. Baehr, took the furniture into account in making his calculations and arriving at his opinion is indicated by his testimony where in the same breath he gave his opinion and referred to the furniture:

> "The Court: Then what was the property worth in the condition that it finally developed it was in? That is what we are interested in.
>
> Mr. Pollack: That is right.
>
> Q. (By Mr. Cutler): Would you give us the answer to that question which the court has propounded, the value as it was actually existing? A. In my opinion the market value as the property actually existed is $10,600.
>
> My market value of the property as it appeared to exist was not $38,000. There was personal property involved which cut the value down.
>
> Q. However, in adding on the $2,500 value of personal property you did arrive at essentially the same figure, did you not? A. That is correct.
>
> Q. $37,000? A. Correct.
>
> Q. Then as it actually existed you have given a market value at that time of $10,600? A. That is correct.
>
> Mr. Cutler: Cross-examine." [R. 79.]

Appellants would certainly not contend that Mr. Stone's testimony did not consider the furniture which was part of his bargain when he said that in his opinion the value which the Farnells received was $25,000. [R. 134.] At least it must be conceded that nothing appears in the

record to indicate that these two witnesses did not have the value of the furniture in mind.

The law supplies the answer as to whether or not the trial judge considered the fact that the furniture was included in the bargain, in the absence of a clear showing that he did not.

> "Rule 52 of the Federal Rules of Civil Procedure for District Courts, 28 U. S. C. A. following section 723c, provides among other things, that, 'Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' The findings of the court are presumptively correct and will not be set aside unless resulting from an erroneous view of the law or are clearly against the weight of the substantial evidence, and in considering this question we view the evidence in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence compelled a finding in his favor." (*Anderson v. Federal Cartridge Corporation* (1946, 8th Cir.), 156 F. 2d 681, 684.)

7. The Findings of Fact and Conclusions of Law Are Sufficient to Support the Judgment.

A. The Supreme Court of the State of California Held in 1954 That Scienter Is Not an Element of Every Cause of Action for Deceit.

Appellees, the Farnells, desire to fully and fairly and directly meet the issue posed by the appellants that findings are required upon the issue of scienter and that none appear in the findings of the court. Appellants have pointed out the several respects in which this contention is made and it would, we think, serve no useful

purpose to detail these issues because the application of appellants' contentions to the points which they have made on appeal will be easily observed by the court.

It is, of course, well established that findings of fact need be only findings of ultimate fact and that such findings are only required as to the elements necessary to sustain the judgment. Cases will hereafter be cited which support this proposition.

It should be noted that in discussing appellants' contentions that a finding of scienter is requisite, appellants have cited no case later than *Wishnick v. Frye* (1952), 111 Cal. App. 2d 926, 245 P. 2d 532. Appellants also cite the following cases:

Hoffman v. Kirby (1902), 136 Cal. 26, 68 Pac. 321;

Gonsalves v. Hodgson (1951), 38 Cal. 2d 91, 237 P. 2d 656.

In 1954 the Supreme Court of the State of California in the case of *Gagne v. Bertran,* 43 Cal. 2d 481, 275 P. 2d 15, said in a footnote at page 487, which refers to Civil Code Section 1710, as follows:

> "Since the Legislature in this section of the Civil Code has made the cause of action for negligent misrepresentation a form of deceit, statements in a number of cases, contrary to this section and the cases cited in the text, that scienter is an essential element of every cause of action for deceit are erroneous and are therefore disapproved. (See, for example, *Podlasky v. Price,* 87 Cal. App. 2d 151, 161 [196 P. 2d 608]; *Swasey v. de L'Etanche,* 17 Cal. App. 2d 713, 716-717 [62 P. 2d 753]; *Palladine v. Imperial Valley Farm Lands Assn.,* 65 Cal. App.

727, 742 [225 P. 291]; *Griswold v. Morrison,* 53 Cal. App. 93, 101 [200 P. 62]; *Smeland v. Renwick,* 50 Cal. App. 565, 569 [196 P. 283].)"

In the same case at page 488 in a footnote and with reference to Civil Code Section 1709, the court says:

> "Under this section of the Civil Code the intent required to prove a cause of action for deceit is an intent to induce action. An 'intent to deceive' is not an essential element of the cause of action, and statements in a number of cases, contrary to this section and the cases cited in the text, that such an intent is an essential element of deceit are erroneous and are therefore disapproved. (See, for example, *Cardozo v. Bank of America,* 116 Cal. App. 2d 833, 837 [254 P. 2d 949]; *Hayter v. Fulmor,* 92 Cal. App. 2d 392, 398 [206 P. 2d 1101]; *Boas v. Bank of America,* 51 Cal. App. 2d 592, 598 [125 P. 2d 620]; *Griswold v. Morrison, supra,* 53 Cal. App. 93, 97; *Smeland v. Renwick, supra,* 50 Cal. App. 565, 569; *Hodgkins v. Dunham,* 10 Cal. App. 690, 698 [103 P. 351].)"

The text referred to includes all the cases cited by appellants and many others. *It must be taken to be the law of California that scienter is not an essential element of every cause of action for deceit and since it is not an essential element, it need not be pleaded and by the same token, it need not be found by the trial court in its findings of fact,* and since the essential elements of a cause of action is a matter of substantive law and not a matter of procedure, the law of the State of California controls.

While the foregoing should dispose of this argument by appellants, we take the liberty to point out several other equally applicable arguments based on the procedural

aspect of the same problem which is governed by the law of the forum to wit, the laws of the United States, the Federal Rules of Civil Procedure.

B. Admissions Contained in the Answer Make Unnecessary Some of the Findings Appellants Think Are Required.

Appellants relied heavily upon the proposition that an alleged negative pregnant existing in the findings sufficiently cast doubt upon the specific finding of damage to constitute reversible error. Authority has already been cited in this brief to the contrary and as said in *Ballagh v. Williams* (1942), 50 Cal. App. 2d 10, 14, 122 P. 2d 343:

> "In any event the logical defect of a negative pregnant does not apply to findings. (*McAuliffe v. McAuliffe,* 53 Cal. App. 352 [199 Pac. 1071].)"

The rule applicable to negative pregnants found in the answer is that a denial containing a negative pregnant is an evasive answer, and, therefore, an admission which does not raise an issue. Findings are only required upon the contested issues. (*Petersen v. Murphy* (1943), 59 Cal. App. 2d 528, 139 P. 2d 49.)

Appellants' answer contains negative pregnants which presently will be pointed out. These negative pregnants constitute admissions concerning which findings are not required.

Appellants admitted (not by way of negative pregnant, but by failure to deny) all of the allegations of paragraph III of the Second Cause of Action of the complaint. [R. 9.] This paragraph is a statement of the representations which the Stones made to the Farnells. One of

these representations was that the property being sold by the Stones was well worth the price asked by the Stones, namely $38,000.00. Paragraph XI of the same cause of action of the complaint alleges:

> "That defendants *falsely and fraudulently* represented to plaintiffs that their residential property being sold by defendants to plaintiffs was well worth the purchase price of $38,000.00; that in truth and in fact the said residential property was not worth more than $18,000.00." [R. 14.] (Emphasis added.)

The representation had already been admitted as above explained so that the quoted allegation added the elements of *"falsely and fraudulently,"* restated the $38,000.00 figure and added the $18,000.00 figure. This allegation was denied "generally and specifically" by reference to paragraph number. This is a denial in the conjunctive which is an admission as explained in *Fitch v. Bunch* (1866), 30 Cal. 208.

It is also an admission of both monetary amounts as fully explained by authorities cited by appellants at pages 43 to 46, inclusive, of their opening brief. See *Janeway & Carpender v. Long Beach Paper & Paint Co.* (1922), 190 Cal. 150, 21 Pac. 6, from which we quote as did appellants in their brief:

The denial of nonpayment of $6,190.88 was in the following form:

> "Defendant '. . . denies that the said sum of $6,190.88 has not been paid.' "

The Court said:

> "This is an admission that the sum of $6,190.87 is unpaid. . . ."

From the foregoing it is clear enough that appellants have admitted their fraudulent representations as alleged in the complaint and that the property was not worth more than $18,000.00 which admission should result in an award of damage equal to the difference of $20,000.00.

On precisely the same basis, paragraphs II and III of the Third Cause of action in the complaint [R. 15] and paragraph XI of the Second Cause of Action, incorporated by paragraph I of the Third Cause of Action (which is the paragraph just discussed) were admitted. These admissions are as above stated and that the property would have been worth $38,000.00 if it had been as represented and that it was actually only worth $18,000.00, and, interestingly enough, that as a result of appellants' fraud that appellees were damaged in the sum of $20,000.00.

Appellees have not complained by appeal of the fact that the court awarded them $5,000.00 less than appellants concede is due.

At another point in this brief, cases were cited to the effect that representations simply as to value are usually considered to be matters of opinion. However, when such representations are coupled with representations as to other facts, they cease to be representations as to value only and are actionable. In the instant case, the representation as to value was coupled with representations as to what improvements were on the land in such a way as to support the representation as to value. In this way the instant case is to be distinguished from those cited elsewhere in this brief on value. See *Meeker v. Cross* (1922), 59 Cal. App. 512, 519, 211 Pac. 229:

". . . The general rule is that a bare and naked statement as to the value of property, in the absence of confidential relations between the parties, is deemed the opinion of the party making the representation, and upon which the purchaser thereof has no right to rely, but acts upon his own judgment. Apparent exceptions found are due to statements of extrinsic facts affecting the value and with which the false representation is made or upon which it is based. (*Winkler v. Jerrue,* 20 Cal. App. 555 [129 Pac. 804]; *Ellis v. Andrews,* 56 N. Y. 83 [15 Am. Rep. 379]; *Schumaker v. Mather,* 133 N. Y. 590 [30 N. E. 755]; *Union Nat. Bank v. Hunt,* 7 Mo. App. 42; S. C., 76 Mo. 439.)"

Of course the law applicable to matters of procedure in the case at bar is the Federal law and not the State law. Rule 8(d) provides that the amount of damage is deemed denied so that the negative pregnant above referred to in connection with the allegation of damage in the amount alleged in the complaint does not constitute an admission under Federal rules. Rule 8(b) provides for the form of denials and requires that denials shall fairly meet the substance of the averments denied. This, the denials in the instant case, fail to do. It is the Federal rule as well as the State rule that an allegation not denied in the answer must be taken as admitted and as was held in *Fontes v. Parker* (C. C. A. 9, 1946), 156 F. 2d 956 at 957:

"Neither proof nor finding is requisite in respect of uncontested issues."

Our research has disclosed but one case with reference to denials of allegations as pleaded, the case of

National Millwork Corporation v. Preferred Mut. F. Ins. Co. (D. C., N. Y., 1939), 28 Fed. Supp. 952, wherein the District Judge said at page 953:

> "While it is true that in paragraphs Second and Fifth of the answer, the defendants do not substantially deny the allegations contained in certain paragraphs of the complaint, they do deny the allegations as pleaded, and defendants are not compelled to adopt plaintiff's manner of pleading, by admitting the same.
>
> "It does not seem to me that any confusion results, but, on the contrary, the answer clearly shows what facts are admitted, but does not admit them in the manner alleged by the plaintiff."

It is not clear whether the court's reference was to the same situation as presented in this case and it should be noted that there is apparently no ruling upon this question by any appellate court of the United States.

Appellate courts are enjoined by statute (28 U. S. C. A. 2111) to sustain the judgment unless the error is such as to affect the substantial rights of the parties. It is clear from the judgment in all respects that the court must have found the allegations which were evasively denied to be true. Since the denials are evasive and do not fairly meet the substance of the averments denied and since findings of fact are not required upon matters which are admitted, *it would be equally technical to hold that findings are required on these matters as to hold that the averments are admitted by a failure of the answer to fairly meet the substance of the averments denied.*

C. Since as a Matter of Law the Stones Are Presumed to Know the Boundaries of Their Land and It Is Admitted That They Did Not, There Is No Issue Which Would Require a Finding of Knowledge of the Falsity of Their Representations.

An owner of land is presumed to know the boundaries of his land and a prospective purchaser is entitled to rely upon the representations of the landowner. (*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 703, 134 P. 2d 764; *Teague v. Hall* (1916), 171 Cal. 668, 154 Pac. 605; *Eichelberger v. Mills Land etc. Co.* (1908), 9 Cal. App. 628, 100 Pac. 709.)

It is an established fact in this case that the Stones misrepresented the boundaries and that the Farnells relied upon the representations to their injury. Since the Stones were presumed to know their boundaries, a finding as to whether they did or not is not required.

D. Under the Federal Rules of Civil Procedure Failure to Make Findings Is Not Jurisdictional and Is Not Necessarily Fatal Error.

It was held in a recent case in the Ninth Circuit that failure to make findings of fact is not jurisdictional where the court refused to make findings and incorporated both findings and judgment in its opinion which was duly entered as a judgment.

> *Steccone v. Morse-Starrett Products Co.* (C. C. A. 9, 1951), 191 F. 2d 197.

Even where findings of fact which were made by the trial court were not sufficient to adequately cover the contested issues, Federal courts have nevertheless con-

sidered the case on appeal and affirmed the judgment after reviewing the evidence and concluding that based upon the facts which were mentioned in the court's opinion and upon the evidence, the decision of the District Court was correct.

Life Savers Corp. v. Curtiss Candy Co. (C. C. A. 7, 1950), 182 F. 2d 4.

As in the State courts, the findings may be inferred from other findings or from the fact that the issue was resolved against one of the parties.

Burkhard v. Burkhard (C. C. A. 10, 1948), 175 F. 2d 593.

Appellate courts have turned to the court's memorandum opinion to aid in explaining the court's decision and findings.

Glens Falls Ind. Co. v. United States (C. C. A. 9, 1956), 229 F. 2d 370;

Skelly Oil Co. v. Holloway (C. C. A. 8, 1948), 171 F. 2d 690.

And it was held in *Goodacre v. Panagopoulos, et al.* (App. D. C., 1940), 110 F. 2d 716, 718, that while the court had failed to comply with Rule 52(a) to find the facts specially, it does not follow that the court must reverse the judgment because the rule is intended to aid appellate courts by affording them a clear understanding of the basis of the decision below. When from the record this clear understanding is afforded, the judgment may stand, although the rule is violated.

8. For Lack of an Indispensable Party, the Court Is Without Jurisdiction to Grant Affirmative Relief on Appellants' Counterclaim.

Appellants are in error in asserting that if the claim of the plaintiffs is reversed, judgment should be rendered in favor of appellants on their counterclaim. (App. Br., Point VIII, pp. 64-65.) Appellants voluntarily dismissed Bank of America as a party defendant to their counterclaim. [R. 40.] Bank of America was trustee of the trust deed which appellants sought to foreclose in said counterclaim; and the trustee of a deed of trust is an indispensable party in foreclosure on a deed of trust. See *Thayer v. Life Assoc. of America* (1885), 112 U. S. 717, 5 S. Ct. 355, 28 L. Ed. 864; *Peper v. Fordyce* (1886), 118 U. S. 468, 7 S. Ct. 287, 30 L. Ed. 435; *Wilson v. Oswego Township* (1894),151 U. S. 56, 14 S. Ct. 259, 38 L. Ed. 70; *Massachusetts and S. Construction Co. v. Township of Cane Creek* (1894), 155 U. S. 283, 15 S. Ct. 118, 39 L. Ed. 153.

Where indispensable parties are not and cannot be joined, the court should not proceed; it cannot enter an equitable judgment in the cause. *Cameron v. Roberts* (1818), 3 Wheaton 591, 4 L. Ed. 467; *Brown v. Christman* (App. D. C. 1942), 126 F. 2d 625.

If an indispensable party is not before the court, the action must be dismissed. *Neher v. Harwood* (C. C. A. 9, 1942), 128 F. 2d 846.

Failure to join the Bank of America as a party does not, however, preclude the court from recognizing defendants' offset for the amount of the second trust deed, since under rule 13 of the Federal Rules of Civil Procedure, and Section 440 of the California Code of Civil

Procedure, the cross-demands of the plaintiffs and defendants "shall be deemed compensated so far as they equal each other."

Conclusion.

The foundation stone of the appeal is the assumption on the part of appellants that the testimony of Mrs. Stone as to the representations which she made to the Farnells must be accepted as true, even though it is completely contradicted by the testimony of Mr. and Mrs. Farnell and other evidence, including conflicts in the testimony of both Mr. and Mrs. Stone and the surrounding circumstances. The trial court resolved the conflict after weighing the evidence and having the opportunity to observe the conduct and demeanor of the witnesses. In view of the fact that it is the universal rule of appellate courts that they will not reweigh the evidence, and as it has been pointed out in argument, the findings of fact are adequate to support an action for fraud and deceit, there is no basis for the appeal.

Respectfully submitted,

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